in the

Supreme Court

of the

United States

OCTOBER TERM, 1974

NO. 74-545

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO, LOCAL 478,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 478, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this matter on July 10, 1974 and August 8, 1974, respectfully.

OPINION BELOW

The Opinion of the Court of Appeals,[1] the decision and Order of the National Labor Relations Board,[2] and the decision of the Administrative Law Judge (then Trial Examiner)[3] all appear in the Appendix.

JURISDICTION

The Judgment of the Court of Appeals was entered on August 8, 1974. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

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[1] *Laborers' International Union of North America, AFL-CIO, Local 478 v. National Labor Relations Board*, No. 73-1819 (CADC 1974).

[2] *Laborers' International Union of North America, AFL-CIO, Local 478 (International Builders of Florida, Inc.) and L. R. Wilson, an Individual*, 204 NLRB No. 32 (1973).

[3] *Trial Examiner's Decision*, Case 12-CB-1170.

QUESTIONS PRESENTED

I.

DOES THE BOARD HAVE AUTHORITY TO AWARD BACK PAY TO A SUPERVISOR DISCHARGED AS A RESULT OF A §8(b)(1)(B) VIOLATION?

II.

MAY THE BOARD OR A COURT CONSTITUTIONALLY AWARD BACK PAY TO A SUPERVISOR WHO PERPETRATED RACE DISCRIMINATION UPON HIS CREW, WHICH DISCRIMINATION TRIGGERED THE CONDUCT FOUND VIOLATIVE OF §8(b)(1)(B) PARTICULARLY WHEN THE UNLAWFUL CONDUCT DID NOT CONSIST OF FORCING THE SUPERVISOR'S DISCHARGE?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. §151 et seq., hereinafter "Act" and Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000(e) et seq.) are set forth in the Appendix.

STATEMENT

A. Statement of Facts

On August 5, 1970 members of Petitioner Local 478 struck the employer upon learning that it had demoted one Eugene Davis, a black assistant foreman, back to laborer since, in the employer's opinion, the job did not warrant two foremen. L. R. Wilson, a white head foreman, was retained as sole foreman. The union business agent, upon learning of the members' reason for engaging in the strike, advised the employer that the strike would end if Davis were reappointed; and the employer promptly made the appointment. Wilson was later discharged because the job did not require two foremen.

At the hearing before the Administrative Law Judge, the union offered to introduce evidence that the reason the laborers struck when Davis was demoted was because they objected to Wilson's racially discriminatory treatment of the black laborers, and they were willing to continue working only if Davis stood between Wilson and the laborers as a "buffer." The Administrative Law Judge excluded the proffered evidence as irrelevant to a determination of whether Local 478 violated §8(b)(1)(B) of the Act, 29 U.S.C. §158(b)(1)(B).

B. The Board's Decision and Order

On the above facts, the Board concluded (Member Jenkins dissenting) that Local 478 had restrained and coerced the employer in the selection of its representatives for collective bargaining and adjustment of grievances, in violation of Section 8(b)(1)(B) of the Act, by insisting that Davis be reappointed as assistant foreman.

The Board reasoned that although Local 478 had a protected right to take concerted action to protest Wilson's discriminatory treatment of the laborers, it did not have the right to dictate that Davis be reappointed. Accordingly, the issue of Wilson's race discrimination was deemed irrelevant to the violation found.

The Board's Order, which adopted without comment the recommended Order of the Administrative Law Judge, required Petitioner to make Wilson whole for any loss of earnings he may have suffered by virtue of the unlawful conduct "which caused the Employer to discharge him as the general foreman. . . ."

C. The Decision of the Court of Appeals

The Court upheld the Board's conclusion that the issue of Wilson's race discrimination toward his crew was irrelevant to a determination of the §8(b)(1)(B) violation under these facts, since the laborers' protest was directed at the appointment of a particular foreman rather than at the discriminatory conduct itself.

This test, advanced by the Board and adopted by the Court, represented a reasonable harmonization of Sections 7 and 8 of the Act[4] under the facts of this case, said the Court, since that test permits employees to engage in §7 concerted activity challenging race discrimination but limits the demands that may be made on the employer to remedy it.

Accordingly, the Board's Decision and Order, including back pay to Wilson, was affirmed.

[4]Concerted action to protest conduct prohibited by Title VII has been construed to be included within the protection of Section 7.

REASONS FOR GRANTING WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT CONFLICTS WITH A DECISION OF THE NINTH CIRCUIT

The decision of the Court below in the instant case is in direct and irreconcilable conflict with the decision of the Court of Appeals for the Ninth Circuit in *National Labor Relations Board v. Silver Bay Local Union No. 962, International Brotherhood of Pulp, Sulphite & Paper Mill Workers*, AFL-CIO, 498 F.2d 26 (CA9, 1974).

The decision in *Silver Bay* was rendered May 22, 1974, too late for Petitioner to rely upon it as a basis for argument to the Court below in the instant case.[5]

There, the Board had found a §8(b)(1)(B) violation against the union and had issued an order identical to the one here, including the provision that the supervisor be made whole for any loss of earnings occasioned by the unlawful conduct. The Ninth Circuit noted that not one case could be found wherein the Board had previously awarded back pay to a supervisor as the result of a

[5]All briefs in the instant proceeding had been submitted by April 19, 1974. Oral argument was had on June 3, 1974. The back pay issue was, however, brought out in Petitioner's briefs in connection with the point presented to the Circuit Court; and the Board had brought the *Silver Bay* decision to the Court's attention in reference to the claimed irrelevance of Wilson's race discrimination.

§8(b)(1)(B) violation; and it therefore remanded the question to the Board for further explanation.[6]

The Court, in passing on the question, found that since supervisors are not protected under the Act, awards of back pay to them were held proper only where the supervisor's discharge by the employer interfered with the rights of the ordinary employees, or where failure to reimburse the supervisor would impair the effective functioning of Board machinery. However, since §8(b)(1)(B) protects the rights of employers, not employees, a back pay award to a supervisor as the result of a §8(b)(1)(B) violation could not be defended on either of those rationales.

We submit that since supervisors are expressly excluded by §2(3) of the Act from the protection afforded ordinary employees by §§7 and 10(c), the Board is totally without authority to issue such awards.

Here, that situation is exacerbated by the dual facts that Wilson is effectively being rewarded for perpetrating race discrimination; and the violation found by the Court below consisted *not* of Petitioner causing Wilson's discharge, but rather of Petitioner causing Davis' reappointment.

We submit that the conflict now existing between the District of Columbia Circuit and the Eighth Circuit should be resolved by the Court so that the question of the Board's authority to issue back pay awards to supervisors dis-

[6]The issue is now pending before the Board on remand. *Silver Bay Local Union No. 962, International Brotherhood of Pulp, Sulphite and Paper Mill Workers*, No. 18-CB-1700.

charged by virtue of a §8(b)(1)(B) violation may be finally settled. The Board has continually attempted to expand the scope and application of §8(b)(1)(B) to areas not encompassed by the literal terms of that Section; and the instant conflict marks yet another excursion into a hitherto unexplored and unexplained deviation from the language of the Act.

Review is therefore warranted.

II.

THE DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT CONFLICTS WITH A DECISION OF THE NINTH CIRCUIT AND REWARDS A SUPERVISOR FOR HIS RACE DISCRIMINATION.

The decision of the Court below in the instant case conflicts in principle with the decision of the Court of Appeals for the Eighth Circuit in *National Labor Relations Board v. Mansion House Center Management Corporation*, 473 F.2d 471 (CA8, 1973).

In *Mansion House*, the issue was whether evidence of a union's racially discriminatory membership requirements was relevant to a determination of a refusal to bargain charge brought by the union against a company pursuant to §8(a)(5). Judge Lay, speaking for the Court, concluded that the Board's action in requiring an employer to bargain with a discriminatory union constituted recognition or enforcement of illegal racial policies by a federal agency, which is proscribed by the Due Process Clause of the Fifth Amendment.

The question presented here is substantially identical to that presented in *Mansion House;* since in upholding the Board's position that Wilson's race discrimination is irrelevant to a §8(b)(1)(B) violation, where the Board has ordered back pay to the discriminatory supervisor as the remedy for that violation, the Court below has upheld the Board's approval of Wilson's discrimination.

We submit that there is substantial disagreement as to the proper scope and application of Title VII policies in determining unfair labor practices and ordering remedies. There is no rational distinction to be made between Board approval of a union's race discrimination and Board approval of a supervisor's race discrimination. In either case, we submit that neither Board nor judicial enforcement of private discrimination can be constitutionally sanctioned.

We submit that unless the conflict now existing between the District of Columbia Circuit and the Eighth Circuit is resolved by this Court, the scope of Title VII principles and their application in determining §8(b)(1)(B) violations and appropriate remedial orders in situations where supervisors engage in unlawful race discrimination will remain shrouded in doubt and continuing conflict as to legal rights and remedies throughout the country. Review is therefore warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

THOMAS J. PILACEK
Attorney for Petitioner

Dated: October 31, 1974